IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20/08/2003

CORAM

THE HON'BLE MR. JUSTICE K.P.SIVASUBRAMANIAM

WRIT PETITION No.13757 OF 1996

M/s.South India Corporation Limited,
Granite Division,
Old Mahabalipuram Road,
Kazhipattu Village,
Chengalpattu Taluk. .. Petitioner.

-Vs-

Regional Provident Fund Commissioner,
(Tamil Nadu and Pondicherry),
20, Royapettah High Road,
Madras - 14. .. Respondent.

Petition filed under Article 226 of the Constitution of India
praying for the issue of a writ of certiorari as stated therein.

For petitioner : Mr.Dwarakanathan.

For respondent : Mr.V.Vibhishanan.

:ORDER

The petitioner prays for the issue of a writ of certiorari to
call for the records relating to the order of the respondent dated 28.6.19 96
and to quash the same.

2. The petitioner is an establishment incorporated as
"Chettinad Granites Limited" which was a 100 per cent export oriented unit.
The Company known as South India Corporation Limited, subsequently became
deemed Public Company was engaged solely in the trading activities. The Board
of Directors of Chettinad Granite Limited, with a view to utilise the funds
generated by the South India Corporation Limited, which was interested in
diversifying the granite field, proposed an amalgamation of Chettinad Granite
Limited with South India Corporation Limited. For that purpose, the Board of
Directors of Chettinad Granites by resolution dated 25.3.1993 considered and
approved the Scheme of amalgamation with South India Corporation Limited.
Similar resolution was also passed by South India Corporation Limited, on
8.3.1993.

3. Pursuant to the said resolution, Chettinad Granite Limited (Transferor) filed on 15.4.1993, a Company Application No.676 of 1993 before this court for approval of the scheme of amalgamation. The South India Corporation Limited, (Transferee) also filed a Company Application No.677 of 1993. By order dated 3.9.1993 this Court approved the Scheme of amalgamation with effect from 1.4.1992. Thereafter the Companies complied with the directions of the Registrar of the Companies, and completed the formalities of amalgamation on 15.10.1993. The petitioner Division also addressed letters to the statutory authorities for the transfer of licences. The amalgamation was approved by the Government subject to the condition that separate identity for the project and accounts for the 100 per cent E.O.U. shall be maintained.

4. The grievance of the petitioner Division is that despite enjoying the benefits of infancy period in terms of Section 16 of the Employees Provident Fund and Miscellaneous Provisions Act, 1952, hereinafter referred to as the Act, the respondent sought to apply for the provisions of the Act for coverage of the employees of the Granite Division from 15.10.1993, being the date when the amalgamation was complete in terms of the order of the High Court. However, the respondent had called for certain documents by letter dated 19.11.1993. Separate Code number was also allotted to the petitioner Division stating that the provisions of the Act will apply from 1.4.1992 treating the Unit as part and parcel of the main unit which was already functioning under the code relating to the South India Corporation Limited. The petitioner submitted that the amalgamation was only with a view to minimise the loss incurred by the petitioner Division and to enable South India Corporation Limited, to diversify their functions. Though the Scheme of amalgamation was approved with effect from 1.4.1992, the actual amalgamation and dissolution of the Company was only on 15.10.1 993. But in spite of several correspondence, the respondent has intimated that contributions will be payable from 1.4.1992. Notice under Section 7-A of the Act for assessment of dues was also issued.

5. The petitioner Division preferred a petition under Section 19-A of the Act to the Government of India. The Legal Adviser by order dated 15.1.1996 expressed that on the date of amalgamation, the petitioner Company was availing the infancy protection. Therefore, there was no liability for Provident Fund and that the Department has not stated any reason for arriving at the conclusion that the petitioner had become a Branch unit of South India Corporation Limited. It was further observed that mere amalgamation of the two Companies may not attract Section 2-A of the Act, unless it is established that the factory run by the transferor Union had become a Department or Branch of the Transferee company. With the result, the order dated 7.3.1995 of the respondent was set aside and on fresh hearing the impugned order dated 28.6.1996 came to be passed holding that the petitioner Company was not entitled to infancy protection and that contribution was liable to be paid with effect from 1.4.1992. Hence, the above writ petition.

6. In the counter filed by the respondent, while denying the various allegations, it is stated that the Granites Division of South India Corporation Limited, was interested in promoting the Transferor Company, the Board of Directors of the erstwhile Company were also found to be the members

of the Transferee Company. Right from the inception, the transferor Company was depending on the Transferee Company for finance. The Transferee Company was promoting the Company and the proposal for merger of both the Companies had been in contemplation even in the earlier stages and both the Companies have resolved in the Board meeting to seek merger as on 1.4.1992. It was only later they applied before the High Court for merger. It is further stated that this is a case where the Transferor and Trans feree Companies should have taken note of the provisions of Section 2-A of the Act which clearly states that the Act was applicable to all branches, Department and Units of the establishment. In the counter certain other details have also been stated in support of the contention that for all practical purposes, the merger had taken effect with effect from 1.4.1992 itself. Hence the writ petition was liable to be dismissed.

7. Mr.Dwarakanathan, learned counsel for the petitioner contends that the Scheme of amalgamation of the two companies visualises separate identity and separate accounts for the 100 per cent E.O.U. project which shall be maintained. This was approved by all the authorities inclusive of the Government and the Collector of Central Excise who had granted approval of the merger on condition that the new company should maintain distinct identity and also maintain all accounts and records separately. Therefore, the petitioner Division was enjoying the benefit of infancy protection under Section 16 of the Act. The amalgamation was only for the purpose of minimising the loss incurred by the Transferor of the Division up to 1993. The amalgamation Scheme though approved by the High Court with effect from 1.4.1992, the actual amalgamation was only on 15.10.1993.

8. Learned counsel refers to Section 16(1)(d) of the Act and contends that the applicability of the Act to newly set up industries are exempted until the expiry of the period of three years from the date on which such establishment was set up. What was necessary was the functional integrality and not mere ownership. According to learned counsel, ownership was irrelevant. Learned counsel also took me through the order of the Central Government dated 16.1.1996 in the Application filed by the petitioner under Section 19-A of the Act holding that the effective date of amalgamation will be the date so provided in the order of the High Court. Learned counsel also places reliance on the following judgments in support of his contentions.

9. In SUNDER TRANSPORT & ANR. v. THE REGIONAL P.F.COMMI. (1992 II C.L.R., 977), the learned Judge of the Bombay High Court held that there was a clear distinction between different departments or branches of one establishment and different establishments.

10. In METAZINC PVT. LTD. v. R.M.GANDHI, RPFF & ORS. (1992 II L.L. J., 647), the learned Judge of the Bombay High Court held that in deciding the issue as to whether protection of infancy period was available, every case has to be decided on the relevant facts of the particular case. Except for the fact the petitioner Company was owing two units and there was consolidation of their accounts and there was nothing which can be said to be indicative of the two units being a departmental or branch of each other.

11. In B.G.BHANDARKAR v. REGN. P.F.COMM.,BANGALORE (1994 III L.L.J. (Supp) 1193), Rajendrababu,J. as he then was held on the facts of the case that the nature of activities carried on by two establishments were entirely different and that one was not a feeder to the other, although there may be unity in capital and management. It was further held that in the absence of interdependability or interlink between the two establishments, in so far as the functional aspects are concerned, the statutory requirements would not be satisfied.

12. In D.S.ASSOCIATES & ORS. v. R.P.F.COMMR. (1997 I L.L.J., 1167, it was held that mere common ownership of the two units and the location of the two units in a commmon premises by itself was not sufficient to satisfy the test of functional integrality.

13. In MUMBAI MAZDOOR SANGH v. R.P.F.COMMR. (2000(2) L.L.N., 159), the Bombay High Court held that the mere fact that the respondent had consolidated the accounts of the two units cannot result in the conclusion that both the units would constitute one establishment.

14. Per contra, Mr.V.Vibhishanan, learned counsel for the respondent, refers to the charging provisions of the Act and contends that the liability under the Act arises from the moment an employee is engaged for the work. Infancy protection is in the nature of a temporary exemption and in order to be qualified for the same, strict scrutiny of the functions of the two establishments have to be undertaken. Learned counsel also took me through the series of correspondence/ orders, to which the petitioner was a party which according to him would establish that the petitioner was part and parcel of the old establishment and that the petitioner was aware of the liability to meet the demands arising out of the workers, even with effect from 1.4.1992. The petitioner cannot therefore, be allowed to contend that the Unit had not come into existence with effect from 1.4.1992. In order to avoid repetition, I would deal with the series of facts relied upon by learned counsel for the respondent in the discussion below. On the basis of the said facts, learned counsel contends that the petitioner Company was not only very much aware of their liability from 1.4.1992, but also the effect of the order of the High Court in the Application for amalgamation. On a proper interpretation, the liability for Provident Fund would be enforceable from the said date.

15. In reply, Mr.Dwarakanathan, learned counsel contends that the argument of learned counsel for the respondent would only substantiate the fact of common ownership of both the establishments. The ownership was not at

all relevant for the issue. If the establishments independently satisfy the description of an infant establishment, then the benefits are certainly available.

16. I have considered the submissions of both sides. Section 16(1)(d) of the Act is as follows:-
"16. Act not to apply to certain establishments. - (1) This Act shall not apply -

(a) ..
(b) ..
(c) ..
(d) to any other establishment newly set up until the expiry of a period of three years from the date on which such establishment is, or has been, set up.
Explanation.- For the removal of doubts, it is hereby declared that an establishment shall not be deemed to be newly set up merely by reason of a change in its location."

17. The word "establishment" is not defined under the Act. But under Section 2-A which provision has been inserted for the removal of doubts, it is declared that if an establishment consists of different Departments or has branches situated in the same or different places, all such departments or branches shall be treated as part of the same establishment. This provision inserted in the year 1960 was obviously intended to deal with the attempts on the part of the Management to wriggle out of the applicability of the Act and to seek the benefit of infancy protection in favour of branches and Departments which are part of the main establishment. It is also true that on the basis of the series of judicial interpretation of both Section 2-A and Section 16(1)(d) as cited above, it has been held that the fact that the Unit in question has been established or taken over by the owner or proprietor of another concern, which is covered by the provisions of the Act, will not by itself render the new Unit, a branch or department of the old unit. In such a case, unless it is shown that the functional integrality of both the Units was such that one unit was dependant on the other and in matters of finance and employment both units were integrated, it will not be possible to treat the new Unit as a branch or a department of the old unit. Therefore, the entire issue has to depend upon the facts and circumstances of each case. In the above background, we have to decide as to what is the date on which the merger had taken effect and what are the commitments of the Transferee Company with reference to the employees of the Transferor Company and how both the Companies had agreed to deal with the said issues. The following features would disclose that the Transferee Company had become part and parcel of the Transferee Company with effect from 1.4.1992.
(I) The minutes of the meeting of the Board of Directors of the Transferor Company dated 25.9.1993 dealing with the merger proposals make it clear that it was resolved that the Scheme of the merger would be effective from 1.4.1992. The financial interests of both the establishments were fully taken into consideration and so monitored and adjusted so as to fix the value of one share of the transferee Company as equal to Rs.50,000/- which amount was fixed after taking into account, the probable loss to be incurred by the Transferor Company as on 3 1.3.1992 and also by treating the par value of the share as the real value of one share of the Transferee Company.

(II). In the order of the High Court dated 27.8.1993, in C.P.No.73 of 1993, also it is made clear that the amalgamation was ordered with effect from 1.4.1992.
(III). In the further order dated 3.9.1993, the Court had sanctioned a Scheme for amalgamation with effect from 1.4.1992.
(IV) Under Clause (1) of the Scheme, 1.4.1992 is given as the date

from which the Scheme shall be effective. Under Clause (2), with effect from the effective date, all the properties, business, rights and powers, investments, etc. will stand transferred to and vested to the Transferee Company. Under Clause (5), with effect from 1.4.1992, all the staff, workmen and other employees in the Transferor Company shall become the staff of the Transferee Company and that the terms and conditions of service applicable to them after such transfer shall not be in any way less favourable to them than those applicable before the transfer.
(V). The Transferor Company by their letter dated 14.10.1993 to the Registrar of Companies, have informed that the effective date of amalgamation shall be 1.4.1992 and that all their assets and liabilities will stand vested with the Transferor Company with effect from 1.4.19 92.

(VI). Again in their letter to the Regional Provident Fund Commissioner, dated 7.12.1993 also, the same stand has been taken and information has been furnished. It is pertinent to note that in the said letter, they have not claimed any infancy protection. On the other hand, they had in fact sought for separate Code number for making the remittance.
(VII). A perusal of the impugned order also shows that detailed reasons have been given by the Regional Provident Fund Commissioner, in coming to the conclusion that the petitioner was not entitled to infancy protection. I do not find any reason to differ from the various reasons stated under the impugned order.

18. The above features disclose that the functional integration of the two Companies was complete as on 1.4.1992. This is more so in the context of Clause (5) of the Scheme dealing with the interests of the workers which has already been referred to earlier.

19. Therefore, I do not find any reasons to interfere with the findings in the impugned order fixing the liability to pay contribution under the Act with effect from 1.4.1992. The writ petition is dismissed. No costs.

Index: Yes.
Internet : Yes.
sai/-

To
The Regional Provident Fund
Commissioner,
(Tamil Nadu and Pondicherry),
20, Royapettah High Road,
Madras - 14.